Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

IN SUK CHANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts' error concluding that Petitioner failed to "accept responsibility" for his actions, when Petitioner acknowledged the *facts* but raised a mere *legal inquiry* ("How did I engage in 'interstate commerce' "), violates the Constitution and the laws of the United States and creates a confusing conflict among the circuits.

2. A. Whether the lower courts' error concluding that Petitioner used "dangerous weapons," where the victim was assaulted with non-dangerous objects (an ice bucket and a stack of restaurant menus), violates the Constitution and the laws of the United States.

B. Whether the lower courts' error effectively eliminating the limits of "bodily injury" and "serious bodily injury" violates the Constitution and the laws of the United States.

3. Whether the lower courts' error of concluding that a victim suffered "significant bodily injury" on the basis of a mere hospital stay, without reliable medical proof, violates the Constitution and the laws of the United States.

LIST OF PARTIES

The parties below were the government; Min Kim Lee, Dae Young Jeong, Ki Hyuk Kïm, and Petitioner In Suk Chang, as defendants.

CORPORATE DISCLOSURE

Not applicable.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS 2

RELEVANT STATUTES 2

STATEMENT OF THE CASE 7

REASONS FOR GRANTING A WRIT 10

Summary 10

I THE LOWER COURTS' ERROR AS TO ACCEPTANCE OF RESPONSIBILITY VIOLATES PETITIONER'S BASIC RIGHTS AND VIOLATES THE CONSTITUTION AND CREATES A CONFUSING CONFLICT AMONG THE CIRCUIT COURTS 11

II THE LOWER COURTS' *AD HOC* CONSTRUCTION OF "DANGEROUS WEAPON" VIOLATES THE CONSTITUTION AND THE LAWS OF THE UNITED STATES 14

III THE LOWER COURTS' CONSTRUCTION OF "SERIOUS BODILY INJURY" ON THE BASIS OF A MERE HOSPITAL STAY, WITHOUT MEDICAL EVIDENCE, VIOLATES THE CONSTITUTION AND CREATES A CONFUSING CONFLICT AMONG THE CIRCUIT COURTS .. 16

TABLE OF CONTENTS – Continued

Page

A. The Lower Courts Misstated the Law of "Serious Bodily Injury" and Thereby Illegally Increased Petitioner's Sentence..... 16

B. The Lower Courts Failed to Require Medical Testimony on Esoteric Medical Data and Thereby Illegally Increased Petitioner's Sentence..... 18

CONCLUSION 20

Appendix A .....App. 1

Appendix B .....App. 6

Appendix C .....App. 26

Appendix D .....App. 28

Appendix E .....App. 30

Appendix F .....App. 32

TABLE OF AUTHORITIES

Page

CONSTITUTION

U.S. Const., Amend. V 2

U.S. Const., art. 1, section 9, cl., 3 2

CASES

Calder v. Bull, 3 U.S. 386 (1798) 15

Gardner v. Florida, 430 U.S. 349 (1977) 14, 15

United States v. Beckner, 983 F.2d 1380 (6th Cir. 1993) 14

United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990) 11, 13

United States v. Brett, 872 F.2d 1365 (8th Cir. 1989) 19

United States v. Davis, 19 F.3d 166 (5th Cir. 1994) 17

United States v. Desormeaux, 4 F.3d 628 (8th Cir. 1993) 17

United States v. Dodson, 109 F.3d 486 (8th Cir. 1997) 17, 18

United States v. Fatico, 579 F.2d 707 (2d Cir. 1979) 8

United States v. Fells, 78 F.3d 168 (5th Cir. 1996) 11

United States v. Gonzalez, 16 F.3d 985 (9th Cir. 1993) 11

United States v. Greene, 71 F.3d 232 (6th Cir. 1995) 12

United States v. Hamilton, 929 F.2d 1126 (6th Cir. 1991) 14

United States v. Heldberg, 907 F.2d 91 (9th Cir. 1990) 14

United States v. Ing, 70 F.3d 553 (9th Cir. 1995) 12

United States v. Johnson-Dix, 54 F.3d 1295 (7th Cir. 1995) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Marshall, 940 F.2d 382 (8th Cir. 1991) 18

United States v. Medved, 905 F.2d 935 (6th Cir.), *reh'g denied, cert. denied*, 498 U.S. 1101 (1990) 14

United States v. Moore, 997 F.2d 30 (5th Cir.), *reh'g denied, cert. denied*, 510 U.S. 1029 (1993) 17

United States v. Neadle, 72 F.3d 1104 (3d Cir. 1995) 20

United States v. Newman, 982 F.2d 665 (1st Cir. 1992) 19

United States v. Paccione, 751 F. Supp. 368 (S.D.N.Y. 1990) 13

United States v. Patino-Cardenas, 85 F.3d 1133 (5th Cir. 1996) 11, 14

United States v. Perkins, 132 F.3d 1324 (10th Cir. 1997) 18

United States v. Perkins, 89 F.3d 303 (6th Cir. 1996) 18

United States v. Rivera, 83 F.3d 542 (1st Cir. 1996) 19

United States v. Roach, 28 F.3d 729 (8th Cir. 1994) 14

United States v. Sgron, 921 F.2d 25 (2d Cir. 1990) 14

United States v. Wright, 117 F.3d 1265 (11th Cir.), *cert. denied*, 522 U.S. 1007 (1997), *reh'g granted, vacated in part*, 133 F.3d 1412 (11th Cir. 1998), *cert. denied*, 525 U.S. 894 (1998) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES & RULES

18 U.S.C. § 1951 2

18 U.S.C. § 2 2

18 U.S.C. § 3551 3

28 U.S.C. § 1254(1) 1

18 U.S.S.G. § 1B1.1 17

§ 1B1.1(d)(i) 14

§ 1B1.1(d)(ii)(I) 14

§ 1B1.1(d)(ii)(II) 15

18 U.S.S.G. § 2B3.2 5

18 U.S.S.G. § 3E1.1 ..... 5, 11

F.R.E. 1106 18

Sup. Ct. R. 10 ..... 10, 11

Sup. Ct. R. 13.1 1

OTHER AUTHORITIES

Jeffries, *Legality, Vagueness and the Construction of Penal Statutes*, 17 Va. L. Rev. 189 (1985) 15

T. Hutchison & D. Yellen, *Federal Sentencing Law and Practice* 5H1.10, at 376 annot. 2 (1989) 13

PETITION FOR A WRIT OF CERTIORARI

Honorable Chief Justice Rehnquist and Associate Justices of the Supreme Court of the United States:

Petitioner In Suk Chang respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered November 21, 2001.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Second Circuit was entered November 21, 2001. *Infra* Appendix A. The opinion of the U.S. District Court for the Southern District of New York was entered January 10, 2001, *infra,* Appendix B.

STATEMENT OF JURISDICTION

Indictment Number 00 CR 58 (NG) was filed in the United States District Court for the Eastern District of New York on January 26, 2000. Petitioner pleaded guilty on May 31, 2000, and was sentenced on January 10, 2001. Judgment was entered on January 22, 2001, and a notice of appeal was filed on January 22, 2001. Judgment of the court of appeals was filed November 21, 2001. The Court has jurisdiction under 28 U.S.C. § 1254(a) and Rule 13.1 of the Supreme Court Rules.

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const., art. 1, section 9, cl. 3

No . . . ex post facto Law shall be passed.

U.S. Const., Amend. V

No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .

RELEVANT STATUTES

Charging Statutes

18 U.S.C. § 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15 [15 USCS § 17], sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45 [45 USCS §§ 151-188].

18 U.S.C. § 3551. Authorized sentences

(a) In general. Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of

Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice [10 USCS §§ 801 et seq.], shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals. An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553 to –

(1) a term of probation as authorized by subchapter B [18 USCS §§ 3561 et seq.];

(2) a fine as authorized by subchapter C [18 USCS §§ 3571 et seq.]; or

(3) a term of imprisonment as authorized by subchapter D [18 USCS §§ 3581 et seq.].

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) Organizations. An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to –

(1) a term of probation as authorized by subchapter B [18 USCS §§ 3561 et seq.]; or

(2) a fine as authorized by subchapter C [18 USCS §§ 3571 et seq.].

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by

section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

Sentencing Guidelines

18 U.S.S.G. § 3E1.1 Acceptance of Responsibility

A) If any defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

B) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease by 1 additional level.

18 U.S.S.G. § 2B3.2. Extortion by Force or Threat of Injury or Serious Damage

(a) Base Offense Level: 18

(b) Specific Offense Characteristics

(1) If the offense involved an express or implied threat of death, bodily injury, or kidnapping, increase by 2 levels.

(2) If the greater of the amount demanded or the loss to the victim exceeded $10,000, increase by the corresponding number of levels from the table in 2B3.1(b)(6).

(3)(A)(i) If a firearm was discharged, increase by 7 levels; (ii) if a firearm was otherwise used, increase by 6 levels; (iii) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (iv) if a dangerous weapon was otherwise used, increase by 4 levels; or (v) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or (B) If the offense involved preparation to carry out a threat of (i) death, (ii) serious bodily injury, (iii) kidnapping, or (iv) product tampering; or if the participant(s) otherwise demonstrated the ability to carry out such threat, increase by 3 levels.

(4) if any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	Add 2
(B) Serious Bodily Injury	Add 4
(C) Permanent or Life-Threatening Bodily Injury	Add 6

(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels;

or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels.

Provided, however, that the cumulative adjustments from (3) and (4) shall not exceed 11 levels.

(5)(A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

STATEMENT OF THE CASE

In a two count indictment returned January 26, 2000, the government alleged that, between October 1999 and January 2000, Petitioner and three co-defendants, all of Korean descent, (1) conspired and (2) in fact extorted employees of certain Korean-owned businesses operating in Flushing, New York, by causing them to refer customers to a "call taxi" service owned and operated by Petitioner, "Dae Myung Call Taxi" company.

The government's case was based primarily on an incident at the Northern Northern Restaurant located on Northern Boulevard, Flushing, on the early morning of January 11, 2000. Defendants went to the Northern Northern and allegedly *extorted* one of its night employees, one Ki Young Sung (Sung), by threats and physical assault against him.

There was no dispute below that Petitioner and Kim (and possibly others) *assaulted* Sung. Sung was struck by a glass ice bucket which was flung at him and was hit

with a stack of restaurant menus. *See infra* Appendix B, at 43. Although Petitioner was intoxicated at the time, Petitioner acknowledged his role in the assault as a *matter of fact*. Petitioner did not, however, acknowledge committing "extortion" because he disagreed with the *application* of "extortion" statute to the facts as a *matter of law*.

The difficulty of applying the extortion statute to the circumstances is supported by the victim's own testimony as well. During the October 10, 2000, *Fatico* sentencing hearing, (pursuant to *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1979)), Sung himself testified that he believed, both before and at the time he was being assaulted, he was not being threatened or coerced: What turned out to be the government's "non-proof" went as follows:

> [By AUSA Pamela Chen:]
>
> Q Now, what exactly did you mean when you said that Chang *never coerced* you?
>
> A *I never thought that I was being threatened by Mr. Chang. Not even once.*
>
> Q Now, are you saying that before the incident, you never felt like Mr. Chang was threatening you?
>
> A *Right.*

Infra, Appendix C (Court of Appeals A115) (emphasis added).

In Government Exhibit 5 to the *Fatico* hearing, a hand-written note prepared in Korean by Sung himself and submitted directly to the district court, later translated into English, Sung candidly stated, "Mr. In Suk Jang [sic] of Dae Myung Call Taxi and his team *never coerced me*

to call for [their] car service, imposed purchase of alcoholic beverages, or made various threats to me." *Infra*, Appendix D (emphasis added).

During sentencing, when given an opportunity to address the district court, Petitioner unequivocally acknowledged his role in the assault *as a matter of fact*, but stated he did not understand the *legal application* under "extortion" law. *See infra* Appendix E. Recognizing Petitioner's factual acknowledgment, the Probation Department's pre-sentence report (PSR) recommended a three-point reduction for acceptance of responsibility. *Infra* Appendix F. The government apparently did not object.

Despite these facts, the district court held that Petitioner had failed to accept responsibility, *see infra* Appendix B, and denied downward adjustment. Petitioner's mere *legal* inquiry resulted in jeopardy, with the district court denying him credit for acceptance of responsibility. On appeal, the Second Circuit treated the district court's decision as a factual one, applied the "clear error" standard, and affirmed in an unpublished opinion. *Infra* Appendix A. As discussed *infra*, Petitioner maintains that the judgment below improperly affirmed an illegal sentence that should have been reversed as a matter of *law*.

The district court next issued enhancements (1) for using "dangerous weapons" and (2) for causing "serious bodily injury." As to the former, the district court held, "I conclude all three weapons, the ice bucket, the stack of menus, and the stick are dangerous weapons within the meaning of the guidelines as defined at 1(b)1.1 D, a dangerous weapon includes an instrument capable of inflicting serious bodily injury." *Infra* Appendix B, at 43.

The district court based this conclusion on its finding that these items (ice bucket and a stack of menus) were *used* to harm; rather than their *inherent characteristics* (such as the inherent dangerousness of a firearm or a knife). The district judge imposed a four-level enhancement for using "dangerous weapons," and the court of appeals affirmed.

As to the latter, the district court held that the mere fact that the victim was hospitalized for ten days: "Mr. Sung's serious bodily injury is shown by the fact that he was hospitalized for ten days." Appendix B, at 42. Although Mr. Sung's medical records were proffered, and the government had identified an expert witness on the medical data for trial, no expert or even lay opinion was offered, or required, at sentencing, on the issue of the medical data.

The district court failed to distinguish "bodily injury" with "serious bodily injury," and, indeed, effectively merged the two categories, leaving no limits between the two levels of injury, and the Second Circuit affirmed.

REASONS FOR GRANTING A WRIT

Summary

1. The Second Circuit's decision below creates confusion and conflict among the circuits, and the Court's guidance is needed on important issues affecting the rights of criminal defendants to due process in relation to their acceptance of responsibility adjustment. *Infra* Point I. Rule 10 of the Supreme Court Rules.

2. The Second Circuit has improperly sanctioned a lower court's departure from the accepted and usual course of judicial proceedings, warranting the Court's review and supervision concerning "acceptance of responsibility," "dangerous weapons" and "bodily injury" concepts. *Infra* Points I, II & III. Rule 10(a) of the Supreme Court Rules.

I

THE LOWER COURTS' ERROR AS TO ACCEPTANCE OF RESPONSIBILITY VIOLATES PETITIONER'S BASIC RIGHTS AND VIOLATES THE CONSTITUTION AND CREATES A CONFUSING CONFLICT AMONG THE CIRCUIT COURTS

The lower courts have held that a defendant's factual admission notwithstanding, if he inquires about the *legal application* of a statute charging a violation to which he has pleaded guilty, there is no acceptance of responsibility.

Petitioner has been unable to find a reported Second Circuit decision on point, but the Commentary to the Sentencing Guidelines and reported decisions from other circuits address the issue.

Application Note 2 to Guideline Section 3E1.1 (acceptance of responsibility) clearly provides, in pertinent part:

> . . . Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a

> defendant goes to trial to assert and preserve *issues that do not relate to factual guilt* (e.g., to make a constitutional challenge to a statute or a *challenge to the applicability of a statute or a challenge to the applicability of a statute to his conduct*). [Emphasis added.]

Correctly applying the Application Notes, the Fifth, Eighth and Ninth Circuits hold that "acceptance of responsibility" exists so long as a defendant admits his conduct *factually*, even if he has engaged in *legal* objections. *E.g., United States v. Fells*, 78 F.3d 168, 171 (5th Cir. 1996); *United States v. Patino-Cardenas*, 85 F.3d 1133, 1135 (5th Cir. 1996); *United States v. Ing*, 70 F.3d 553 (9th Cir. 1995); *United States v. Big Crow*, 898 F.2d 1326, 1330 (8th Cir. 1990). Using slightly different language, the Ninth Circuit has held that a defendant's lack of candor as to his motivation for committing a crime is not a basis for denying acceptance of responsibility credit "where the explanation was not made to avoid criminal liability." *United States v. Gonzalez*, 16 F.3d 985, 991 (9th Cir. 1993).

The Eleventh Circuit agreed that denials going to the legal applicability, as distinct from a factual acknowledgment, would not defeat an acceptance of responsibility reduction in its 1997 decision but changed its mind a year later on rehearing. *See United States v. Wright*, 117 F.3d 1265 (11th Cir.), *cert. denied*, 522 U.S. 1007 (1997), *reh'g granted, vacated in part*, 133 F.3d 1412 (11th Cir. 1998), *cert. denied*, 525 U.S. 894 (1998). The Sixth Circuit has expressly rejected the Ninth Circuit's holding in *Gonzalez*, *United States v. Greene*, 71 F.3d 232, 235 (6th Cir. 1995), but the facts of *Greene* clearly show that the defendant was denying factual guilt, rather than the legal application.

Petitioner's inquiry as to the *legal* applicability of his admitted acts of assault appears to have been due to cultural factors, rather than to an unreasonable refusal to acknowledge the *facts*. While the Guidelines provide that "race, national origin, and socioeconomic status are not relevant in the determination of a sentence[,] Commentators . . . note that the 'legislative history suggests that the use of the phrase "are not relevant" may be too sweeping because the Senate Judiciary Committee's report states that "the requirement of neutrality . . . is not a requirement of blindness." ' " T. Hutchison & D. Yellen, *Federal Sentencing Law and Practice* 5H1.10, at 376 annot. 2 (1989) (*quoting* S.Rep. No. 225, 98th Cong., 1st Sess. 171 n. 409 (1983))." *Big Crow, supra,* 898 F.2d at 1332.

The Second Circuit's decision below characterizing Petitioner's mere legal inquiry as "denying an element of extortion," *see* Appendix A, is unreasonable. The Second Circuit's decision below not only runs counter to the other circuits cited above, but it also plainly runs counter to the Guidelines. Ironically, in *United States v. Paccione,* 751 F. Supp. 368, 373 (S.D.N.Y. 1990) (defendant's cooperation with FBI justified reduction for acceptance of responsibility for mail fraud, even though defendant chose to stand trial where challenge was limited to applicability of a statute), a district court within the Second Circuit correctly construed the Guideline and Application Notes, without Second Circuit citation. Thus, the Second Circuit appears to be in discord not only with other well-reasoned circuits, but also with one of its own lower courts.

Given these principles and given the Probation Department's and the government's concessions that

Petitioner accepted responsibility, the lower courts' decisions deprive Petitioner's entitlement. Because an acceptance-of-responsibility reduction is mandatory if the factual predicates exist, *see Patino-Cardenas*, 85 F.3d at 1135-36, the lower courts' failure to do so violates Petitioner's right to due process, which is clearly implicated at sentencing. *E.g., Gardner v. Florida*, 430 U.S. 349, 358 (1977).

II

THE LOWER COURTS' *AD HOC* CONSTRUCTION OF "DANGEROUS WEAPON" VIOLATES THE CONSTITUTION AND THE LAWS OF THE UNITED STATES

The lower courts concluded that an ice bucket and a stack of restaurant menus were "dangerous weapons" under the Sentencing Guidelines because they were *used* to cause injury. Under such methodology, any object may be viewed as a "dangerous weapon."

The Sentencing Guidelines define "dangerous weapon" in three ways: *first*, as an instrument "capable" of causing injury, 1B1.1(d)(i), *United States v. Roach*, 28 F.3d 729 (8th Cir. 1994) (weapon); *United States v. Sgron*, 921 F.2d 25 (2d Cir. 1990) (stun gun is a "dangerous weapon"); *United States v. Heldberg*, 907 F.2d 91 (9th Cir. 1990) (small semiautomatic handgun was a "dangerous weapon"); *United States v. Beckner*, 983 F.2d 1380 (6th Cir. 1993) (car capable of causing injury as a "dangerous weapon"); or, *second*, an object that "closely resembles" a weapon, 1B1.1(d)(ii)(I); *United States v. Medved*, 905 F.2d 935 (6th Cir.), *reh'g denied, cert. denied*, 498 U.S. 1101 (1990) (toy gun "closely resembles" a weapon); *United States v.*

Hamilton, 929 F.2d 1126 (6th Cir. 1991) (Knife otherwise used as a weapon); or, *third*, an object that "created the impression" of a weapon, 1B1.1(d)(ii)(II). By definition, the first two sub-parts of this section are inapplicable since menus and an ice bucket are neither weapons nor objects that even remotely resemble weapons.

The only possible basis for the lower courts' "dangerous weapons" enhancement, then, is the last subpart, where, for example, a bank robber wraps a towel around his hand "to create the appearance of a gun." *Id.* Yet, Petitioner used objects that existed in the restaurant in open view and which, in and of themselves, are harmless. The government must concede that none of the defendants below even remotely attempted to "create the impression" that the ice bucket and menus were capable of being dangerous weapons.

Since none of the three grounds for finding "dangerous weapons" exists, the fact that Sung was injured when the ice bucket was flung at him, or that he was openly struck with a stack of menus, cannot support an enhancement for possessing "dangerous weapons." To do so is to apply the Sentencing Guidelines on an *ad hoc* basis – i.e., since an object caused injury, it must be a "dangerous weapon" – and such application is either an impermissible *ex post facto* law, *see, e.g., Calder v. Bull*, 3 U.S. 386, 390 (1798), or violation of due process, *Gardner v. Florida; see generally* Jeffries, *Legality, Vagueness and the Construction of Penal Statutes*, 17 Va. L. Rev. 189 (1985).

III

THE LOWER COURTS' CONSTRUCTION OF "SERIOUS BODILY INJURY" ON THE BASIS OF A MERE HOSPITAL STAY, WITHOUT MEDICAL EVIDENCE, VIOLATES THE CONSTITUTION AND CREATES A CONFUSING CONFLICT AMONG THE CIRCUIT COURTS

A. The Lower Courts Misstated the Law of "Serious Bodily Injury" and Thereby Illegally Increased Petitioner's Sentence

The district court stated, "Mr. Sung's serious bodily injury is shown by the fact that he was hospitalized for ten days." Appendix B, at 42. Thus, according to the district court, the mere fact of a ten-day hospitalization is sufficient to conclude there was "serious bodily injury."

The Guidelines define "bodily injury" and "serious bodily injury" as follows:

> (b) "Bodily Injury" means any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.
>
> * * *
>
> (j) "Serious bodily injury" means injury involving extreme physical pain, or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C.

> 2241 or 2242 or any similar offense under state law.

18 U.S.S.G. § 1B1.1.

The reference point that measures where a victim has sustained serious or non-serious injury is not defendant's conduct but the actual physical injury sustained by the victim. *United States v. Dodson*, 109 F.3d 486, 489 (8th Cir. 1997) (no bodily injury enhancement where the victim-officer failed to testify as to his injury). In order for the two statutory concepts of "bodily injury" and "serious bodily injury" to have meaning, there must be outer limits of the types of injuries that qualify as one and the other.

On one hand, a gunshot wound which broke victim's fibula, left both entry and exit wounds, and caused the victim to be hospitalized for over two days with his lower leg placed in a cast was a "serious bodily injury," *United States v. Johnson-Dix*, 54 F.3d 1295 (7th Cir. 1995), not because of the hospital stay but because of the *damage* to the victim. The victim's *near-death* caused by his kidnappers, one of whom believed the victim had in fact died, also amounts to "serious bodily injury." *United States v. Davis*, 19 F.3d 166, 171 (5th Cir. 1994). Similarly, stabbing the victim's kidney with a hunting knife, *United States v. Desormeaux*, 4 F.3d 628, 630 (8th Cir. 1993), and gunshot wound where a bullet went through a police officer's leg, causing nearly three months' hospitalization, are "severe bodily injury." *United States v. Moore*, 997 F.2d 30, 37 (5th Cir.), *reh'g denied, cert. denied*, 510 U.S. 1029 (1993).

On the other hand, when the victim sustains a "laceration and bruising," and experiences continual neck and

shoulder pain causing him to seek extended chiropractic treatment, *United States v. Perkins*, 132 F.3d 1324 (10th Cir. 1997), or when the victim is assaulted in the head with a gun and kicked in the face during the course of robbery, *United States v. Perkins*, 89 F.3d 303, 308 (6th Cir. 1996), these are "bodily injuries" and not "serious bodily injuries."

Because the only basis for the district court's enhancement for "serious bodily injury" was the "ten days of hospitalization," the lower courts violated Petitioner's due process rights by even considering an enhancement. Because the injury sustained by the victim appears to have been none of the kinds discussed by the circuit courts dealing with "serious bodily injury" cases, the lower courts violated Petitioner's rights with a "serious bodily injury" enhancement.

B. The Lower Courts Failed to Require Medical Testimony on Esoteric Medical Data and Thereby Illegally Increased Petitioner's Sentence

The lower courts' failure to require medical testimony on esoteric, complicated hospital records violates both the due process clause, *see supra* 13, and the confrontation clause of the Constitution.

Since the resulting injury to the *victim* must be the focus of analysis in the context of a "bodily injury" or "serious bodily injury" enhancement, even the mere failure to call the victim himself is sufficient to defeat the issue. *United States v. Dodson*, 109 F.3d 486 (8th Cir. 1997). Although the Federal Rules of Evidence do not apply to sentencing, *see* F.R.E. 1106, cases construing the Guidelines hold that unreliable evidence must still be excluded. *E.g., United States v. Marshall*, 940 F.2d 382, 383 (8th Cir.

1991), *cf. United States v. Brett*, 872 F.2d 1365, 1372 (8th Cir. 1989).

Although Sung's hospital records were proffered, the government offered no medical testimony as to what Sung experienced or was treated for. It is clear from the district judge's oral opinion that she did not rely on any particular part of the medical record.

Petitioner's denial of minimal fairness is reflected in the First Circuit's case of *United States v. Newman*, 982 F.2d 665 (1st Cir. 1992), where the defendant received a four-level enhancement for causing "serious bodily injury" stemming from his assaulting the victim and causing the victim to be hospitalized for six days, *id.* at 672, almost as long as Sung was hospitalized in Petitioner's case.

In language particularly appropriate here, the First Circuit observed:

> *Medical testimony was presented* that upon entering the hospital Peterson complained of dizziness and tinnitus. While tests were "unrevealing," the *examining neurosurgeon testified* that it was "not unusual" for inner ear damage to be evidenced solely by the patient's "subjective complaints." . . . [Emphasis added.]

Id.

Since Sung's hospitalization, as such, was the sole basis for the "serious bodily injury" enhancement, it was highly speculative and fundamentally unfair for the district court to make this conclusion without any reliable medical evidence other than the mere fact of the hospitalization. *Cf., United States v. Rivera*, 83 F.3d 542 (1st Cir.

1996) (holding it was improper to increase sentence for "extreme mental trauma" with no description of the assault and no professional counseling); *United States v. Neadle*, 72 F.3d 1104 (3d Cir. 1995) (holding it was improper to grant enhancement for physical or psychological harm on mere speculation). This error denies Petitioner's due process rights.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and, upon review, reverse the Court of Appeals for the Second Circuit.

Dated: February 19, 2002

Respectfully submitted,

MICHAEL S. KIMM

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of November, two thousand and one.

PRESENT: HON. WILFRED FEINBERG, HON. RICHARD J. CARDAMONE, HON. SONIA SOTOMAYOR, Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

IN KIM LEE,
Defendant,

IN SUK CHANG, KY HYUK KIM,
and DAE YOUNG JEONG,
Defendants-Appellants.

Nos. 01-1044(L)
01-1045(Con),
01-1061(Con)

Appearing for Appellant Chang: Frank T. Geoly, Brooklyn, NY, on submission
Appearing for Appellant Kim: Barry Gene Rhodes, Brooklyn, NY, on submission

Appearing for Appellee: Pamela Chen, Assistant United States Attorney, Brooklyn, NY (Susan Corkery, Assistant United States Attorney, on the brief), for Alan Vineg United States Attorney for the Eastern District New York, on submission.

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York (Nina Gershon, Judge), it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED. Defendants In Suk Chang and Ki Hyuk Kim appeal from a judgment entered in the United States District Court for the Eastern District of New York (Gershon, J.) following their pleas of guilty to two counts each of extortion under the Hobbs Act, 18 U.S.C. § 1951.

The charges stemmed from threats issued by defendants in relation to a car service and liquor business which they operated. The evidence showed, among other incidents, that on the night of January 11, 2000, defendants and their subordinates paid a visit to the Northern Northern Restaurant and threatened and assaulted several of the restaurant's employees for not utilizing defendant's services.

On May 31, 2000, the day trial was set to begin, Defendants Chang and Kim pled guilty to Count One of

the indictment. Defendant Chang was sentenced principally to a prison term of 121 months; defendant Kim was sentenced principally to a prison term of 97 months. At various times, Chang communicated with the district court questioning how his actions could be deemed extortion. Chang claims that the district court's decision to deny him a two-level downward departure for acceptance of responsibility under U.S.S.G. § 3E1.1 was improperly based on its conclusion that this questioning reflected a failure to accept responsibility, rather than, as Chang contends, confusion resulting from his Korean background and unfamiliarity with the American legal system.

A district court's decision not to grant a downward adjustment for acceptance of responsibility is accorded great deference and will not be reversed unless it can be shown that the decision was without foundation. U.S.S.G. § 3E1.1 cmt. n.5 (2000); United States v. Volpe, 224 F.3d 72, 75 (2d Cir. 2000). The district court had ample basis for its decision. In a letter to the district court, Chang claimed that the incidents at the Northern Northern were a "simple battery" committed "under the influence of alcohol."

Chang thus was not merely questioning the legal significance of his conduct but denied responsibility for a key element of the crime – namely, that he was attempting to gain business through his threats. This denial was completely unrelated to his Korean background and provided foundation for the district court's decision to deny Chang an acceptance of responsibility adjustment. Chang also claims that the district court's decision to sentence him to the maximum guideline sentence constitutes an

abuse of discretion because it was based on general deterrence to the exclusion of adequate consideration of individual factors.

Given that a district court's imposition of a sentence within the applicable guideline range generally cannot be appealed, and Chang's sole challenge to the district court's guideline range calculation having been rejected, this claim is not reviewable. United States v. Solmen, 889 F.2d 441, 443 (2d Cir. 1989). Even if it were, we find no error below. The district court gave adequate consideration to individual factors by noting Chang's brutal conduct during the assault of Ki Young Sung and his lack of remorse or concern for the victims of his conduct. Defendant Kim argues that the district court erred in imposing a two-level sentence enhancement under U.S.S.G. § 3B1.1 for his supervisory role in the underlying extortion.

A district court's interpretation and application of the Sentencing Guidelines is reviewed de novo, while the underlying factual findings supporting the application are reviewed for clear error. United States v. Carpenter, 252 F.3d 230, 234 (2d Cir. 2001). A defendant plays a supervisory role in an offense if the defendant "exercise[s] some degree of control over others involved in the commission of the offense or play[s] a significant role in the decision to recruit or to supervise lower-level participants." Ellerby v. United States, 187 F.3d 257, 259 (2d Cir. 1998) (internal citations and quotation marks omitted). Kim argues that the district court incorrectly inferred from the fact that he was a supervisor in the car service that he also occupied a supervisory role in the activities of the extortion conspiracy.

It is clear from the record, however, that the district court properly focused on Kim's leadership role in the extortionate activity itself and the court's findings in this regard are not clearly erroneous, supported by, inter alia, the fact that Kim told the primary victim of the Northern Northern assault, Ki Young Sung, that he should have "paid attention" and utilized their car service, and the statements of co-defendants in Kim Lee and Dae Young Jeong that they looked up to Kim and Chang as "big brothers." Defendants also contest the district court's finding that Sung suffered serious bodily harm, thus warranting a four-level enhancement under U.S.S.G. § 2B3.1(b)(3)(B).

The Sentencing Guidelines define "serious bodily harm" as "injury involving extreme physical pain or protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation," U.S.S.G. § 1B1.1 cmt. n.1(j) (2000). Defendants challenge Sung's competence to testify to his medical condition, but even without expert medical testimony, Sung was certainly competent to testify to his ten-day hospitalization and nearly year-long hearing impairment, either of which is sufficient to meet the above definition. We find no error in the district court's imposition of this enhancement. We have considered all of the contentions made by defendants and, finding no error, affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	CR 00-58
-against-	United States Courthouse Brooklyn, New York
IN SUK CHANG, KI HYUK KIM, MIN KYO LEE, DAE YOUNG JEONG,	January 10, 2001 11:00 o'clock a.m.
Defendants.	

TRANSCRIPT OF SENTENCE
BEFORE THE HONORABLE NINA GERSHON
UNITED STATES DISTRICT JUDGE

* * *

[39] THE COURT: If there is nothing else that anyone would like to respond to, I would like to go forward and make rulings that apply to one or more defendants, and I will get to certain individual issues and individuals sentencing.

[40] The first issue is the question of role adjustment. The defendant In Suk Chang is given a two level upward adjustment for being a leader and supervisor of extortionate criminal activity. It is given not simply because he was the owner of the car service that was the subject of the extortion, rather because it's clear from the evidence before me, including the videotape, that he lead and supervised the extortionate activity.

The government's argument that the activity involved five or more participants justifies a level four increase is in such evidentiary support. I find the activity was otherwise extensive within the meaning of the guidelines as interpreted by the Second Circuit.

The defendant Kim is also given a two level upward adjustment for his supervisory role in the criminal activity. Although his supervisory position seems to be somewhat less, the evidence supports the application for the two level adjustment. His only post arrest statement indicates that he with others started the car service. He acknowledges in the sentencing papers that he was second in command of the car service, therefore, he had obvious interest in the success of the extortionate activity in which he participated as did Chang. Kim accompanied Chang not only at the incident at the Northern-Northern Restaurant, but also at the incident at the Nari Cafe.

[41] The post-arrest statements of co-defendants Jeong and Lee stated that they looked up to Kim and Chang as big brothers and who support his leadership role.

Drawing reasonable inferences from the totality of evidence I conclude a two level enhancement is called for as to the defendant Kim. As to defendants Jeong and Lee, these defendants each request the minor role reduction of two levels. The defendants have the burden of proving that such reduction are warranted.

Although the Probation Department and the government do not contest the defendants' request, upon review of the evidence, especially the scope of their conduct in

actually beating the victims, I cannot agree to this request.

There are many ways in which a defendant could be a minor participant in a violent extortionate scheme. Being a person who actually engages in a vicious prolonged physical attack on innocent victims, as I observed these defendants on the videotape, is not one of them. I do not find that such behavior is less culpable than that of an average participant in the scheme here charged. That they are less culpable because they are not leaders of the conduct, than the other two defendants is not the issue. The disparity in culpability has been accounted for in the upward adjustments given to the other two defendants. Defendants Jeong and Lee were not minor players. United States versus Casanno decided December 8th, by [42] the Second Circuit, Docket Number 001246.

Next, I am going to address the question of bodily injury. Based upon the evidence I reject the six level upward adjustment that the Probation Department has recommended. I agree with the government four levels should be added under guideline 2(b)3.2. The evidence amply demonstrated this enhancement should be added to each of the defendants' guidelines.

Mr. Song's serious bodily injury is shown by the fact that he was hospitalized for ten days. See application note J to guideline 1(b)1.1.

Mr. Gamble's argument that the hospitalization was prudent, but not required is not supported by the evidence. There is no evidence that anyone but medical personnel decided to keep Mr. Song in the hospital for ten days. Moreover, this conclusion is reinforced by the

photos of Mr. Song and by his credible testimony as to the injuries that he experienced. It is also supported by my review of the videotape which shows him being beaten at one point where he fell to the ground from the blows. It's also supported by the fact that he suffered unconsciousness. It's also supported by the fact that he suffered loss of hearing for a lengthy period of time and of necessity must have experienced great pain and discomfort.

I'm turning now to the question of use of a dangerous weapon. Based upon the evidence at the hearing, including my [43] examination of the actual weapons at issue I conclude all three weapons, the ice bucket, the stack of menus, and the stick are dangerous weapons within the meaning of the guidelines as defined at 1(b)1.1 D, a danger weapon includes an instrument capable of inflicting serious bodily injury. Under 2(b)3.2, four levels are added if a dangerous weapon is used. It's undisputed that as to the ice bucket and the menus the enhancement would apply to all defendants regardless of who actually used the weapon because they were acting in concert.

All defendants challenge the government's request that I treat the ice bucket and the stack of menus as dangerous weapons. I note a finding that either one is a dangerous weapon is sufficient to trigger the four level enhancement. In fact, I find that both are dangerous weapons.

The ice bucket is a heavy glass object clearly capable of inflicting serious bodily injury. Victim Song, who was a thoroughly credible witness, testified that he saw the ice

bucket being thrown by a defendant at a waiter at the Northern-Northern Restaurant.

Also in evidence is a menu from that restaurant identified by the victim, Mr. Song, as one used at the restaurant at the time of the incident. It's bound in leather or leather like material, with metal corners, the videos show [44] Mr. Song being hit across the head with some of these menus. As with the ice bucket, the menu may have innocent uses is immaterial, they were used in such a way as to turn them into dangerous weapons within the meaning of the guidelines.

Finally, I turn to the stick at the Nari Cafe. This applies only to defendants Kim and Chang. The government describes the stick as a bat like stick. Only seeing the stick and lifting it gives the full sense of what this object is.

There is no question in my mind that it's a dangerous weapon. Indeed, it's difficult to imagine that it would have any other use. I further find from the credible and indeed undisputed evidence of Mr. Kang that defendant Kim at a minimum possessed and even brandished this weapon when he and the defendant Chang were at the Nari Cafe. Since the evidence from Mr. Kang established that the defendants Kim and Chang were acting in concert, when they visited the Nari Cafe, the offense level for each of those two defendants as to the Nari Cafe incident must be raised by three levels.

Given the multi count calculation, however, this enhancement, indeed the entire Nari Cafe incident, does not affect the guidelines calculation for the defendants

Chang and Kim. In other words, the sentence is not enhanced, by the Nari Cafe incident at all.

Now, I would like to address the double counting arguments that have been made. Defendant Chang claims where [45] there are adjustments for serious bodily injury to adjustments for dangerous weapon, where the weapon is not inherently dangers, amounts to double counting, but the crime here is not aggravated assault and the cases relied upon by the defendants, which are aggravated assault cases are inapposite.

There is also an argument made by defendants it's improper to apply both the threat of injury enhancement and the actual injury enhancement. I disagree. These enhancements obviously address different concerns and they're not duplicative.

Finally, with respect to the dangerous weapon adjustments, the defendants claim that applying the adjustments violates Aprendo versus New Jersey, 120 Supreme Court, 2348. Unlike in the Aprendi issue, however, here the adjustment do not increase the statutory maximum, therefore, the Aprendi issue claim is rejected. Nor do I think that any higher standard of proof is required here, although the evidence as to the use of a dangerous weapon surely meets the clear and convincing standard, and I find that it does.

Anther general issue that I would like to address is the question of restitution. Restitution in the amount of $8,000 is due to Mr. Song for $7,000 worth of medical bills and lost salary of $1,000. I will be allocating this sum against Mr. Chang, and Mr. Kim, who are I find the most

[46] responsible participants in the crime. It will be divided equally between them.

Turning now to the sentencing of In Suk Chang, I have early said that I reviewed numerous documents. In fact, with respect to Mr. Chang voluminous documents, also on his behalf, even letters from the victim, Mr. Song, and something said to be a deposition of Mr. Song who later testified at the Fatico hearing, after this so-called deposition, with the caption of their case on it, is dated August 18th. Certainly there was no notice to the Court and from all appearances there was no appearance by the government and I think I can fairly assume that the government was unaware of this proceeding entitled the "deposition". I read it. The attorney, not Mr. Geoly, put words in the mouth of the victim. I will take this document for what it's worth, which in my view is very little.

Once again, as he has done before, this defendant claims that he is really only guilty of a minor assault and not the federal crime of extortion. Previously faced with letters making such claims I held a hearing inviting the defendant to tell me whether he wished to move to withdraw his plea. On September 22nd, he reaffirm at that hearing that he did not wish to withdraw his guilty plea and that he plead guilty voluntarily.

In a September 25th letter to the Court, the [47] defendant confirmed this. None the less I have continued to receive contrary correspondence. I note at his plea allocution before me on May 31, 2000, Mr. Chang allocuted that he had threatened an employee at the Northern-Northern Restaurant, to use his car service. I

have no doubt that the elements of the federal crimes are established.

Going over then the guideline calculation for Mr. Chang, the base offense level for extortion is 18, I add two levels for the threat of bodily injury, I add four levels for the use of a dangerous weapon, I add four levels for serious bodily injury, I add two levels for his being a leader of this activity. I deny Mr. Chang any adjustment for acceptance of responsibility.

Ordinarily a guilty plea evidences acceptance, but Application Note Three says that evidence of a plea may be outweighed by conduct of the defendant, which is inconsistent with such acceptance of responsibility. Among other things, one must consider the timeliness of a plea and whether the defendant has truthfully admitted the conduct comprising the crime. The plea was given on the day of trial, that is not saving any prosecutorial resources, he, therefore, at a minimum is not entitled to the third point. More importantly, he now either denies or grossly minimizes his role in a violent extortion.

At the plea proceeding, as I said, he swore under [48] oath that he used threats to get the Northern-Northern Restaurant to use his car service. He now has argued in documents before me and documents that he has had others submitted to me that the assault occurred just because he was a drunk, it was only an assault of a personal nature, there were no threats, no effect on inter-state commerce and so on. In addition, he has clearly shown no remorse –

See, for example, United States versus Volpe, 224, F. 2d, 72, of Judge Nickerson denial of acceptance of responsibility on this ground.

– in contrast to the victims who have candidly and very movingly attempted to try to understand this incident, and be forgiving, even though they have suffered, and they have expressed concern that the defendants not spend a lifetime in jail because they're young.

In contrast to that, Mr. Chang has expressed no concern whatsoever for the victims. He has a criminal history category of one, the guidelines, adding up the category is level 30, the range is 97 to 121 months. The assaults by Mr. Chang were particularly brutal. Over and over again he struck the victim with his fist, even kicking Mr. Song in the head after Mr. Song had fallen down from the assault. He was the leader of a group that assaulted Mr. Song who testified as well as the chef, the parking man and at least one other waiter.

[49] For purposes of punishment and deterrence, and in order to assure that honest and innocent members of our community, who were trying to make an honest living do not have to live in fear, I sentence the defendant, Mr. Chang, to the top of the guidelines, which is 121 months in custody, three years supervised release, $200 special assessments, which is mandatory, $4,000 in restitution to Mr. Song and the checks are to be made out to the clerk of court. He is to, as a condition of supervised release, pay $200 a month beginning 60 days after his release from custody and there will be no fine in light of the propriety of restitution and the fact that he has some debts and I advise Mr. Chang of his right to an appeal.

Turning to Mr. Kim, I received a letter in November from Mr. Kim after the Fatico hearing changing that the government has no evidence of extortion or threats and asking to be sentenced for assault. He repeated those comments today. Mr. Kim's sworn statements before me at the plea allocution that he threatened employees of the to use his car service.

Again, there is no question that the elements of federal extortion were stabbed. There has not been a motion to withdraw the plea and I understand that he does not wish to withdraw his me. Mr. Kim, also relies on various letters, including letters from the victims purporting to minimize the [50] significance of the attack.

Although Mr. Kim himself engaged only in a single slap at the Northern-Northern he was clearly not only a participant, but as I have said a leader of the activity at that restaurant. They also entered and left together and were all there for the same purpose. Admitted as much in his post-arrest statements and he was also, of course, involved in the other extortionate incident at the Nari Cafe. By agreement of the government, I will direct that probation strike any reference to his involvement in the Hawaii Two incident in the PSR.

I have also received numerous letters from family and friends of Mr. Kim requesting leniency. The guideline calculation is 18, base offense level, two levels are added for the threat, four levels for dangerous weapon use, four levels for serious bodily injury, two levels because he was a leader and I grant the defendant two levels off for acceptance of responsibility, but the plea having been given on the day of trial I cannot consider it timely within

the meaning of the guidelines and deny him the third point that a timely plea would entitle him to. He is, therefore, at guideline level 28, criminal history category one, the guideline range is 78 to 97 months. I now sentence the defendant to the top of the guideline range for purposes of both punishment and deterrence for the reasons that I have said as to Mr. Chang, that is the [51] importance of assuring that the community knows that it can feel safe in the conduct of its businesses and the need to punish this type of conduct. There will be three years of supervised release, no fine, because of the priority of restitution, and I am ordering $4,000 in restitution and as conditioned of supervised release, the defendant is to pay $200 a month beginning 60 days after his release. The defendant is advised of his right to appeal this sentence. There is a special assessment of $200 for Mr. Kim.

Turning to Mr. Lee, who is 20 years old, he has expressed regret to the victim. The guidelines as to him, the calculation is 18, base offense level, two levels are added for threat of bodily injury, four levels added for use of a dangerous weapon, four levels added for serious bodily injury to the victim and I reduce the level by three for acceptance of responsibility. He offense level is, therefore, 25 and a criminal history of one. The range is 57 to 71 months.

Mr. Gamble has argued that this was youthful swagger. I can't accept that. Mr. Lee beat Mr. Song viscously and without respect with his fist and legs. I hope that as he has said to me he understands now the seriousness of what he did.

The defendant has requested a downward departure on various grounds relating to his personal circumstances. I decline to depart. However, I will because of the defendant's [52] youth sentence the defendant at the low end of the guidelines to five years in custody, three years of supervised release, and as condition of the supervised release, he is to get drug and alcohol abuse treatment, he is to obtain his high school diploma, if he doesn't get it in the prison, which I assume that he will. He's to maintain regular lawful employment. There will be no restitution for the reasons I stated earlier. A $100 special assessment and no fine because of his inability to pay a fine. The defendant is advised that of his right to appeal, but I note that in the plea agreement there was a waiver of certain appeal rights and I would leave that to the your discussion with your attorney in terms of whether or not there are any remaining rights.

Finally, as to Mr. Jeongy, again I received many letters on the defendant's behalf from the community. I also received a letter from the defendant himself and a letter from a C.S.W. Delores Andrews who evaluated the defendant. It was an impressive letter from the defendant. If, as I hope it is, a sincere letter, then there is no reason that this defendant cannot turn his life around and do what he says he will do, which is become a law biding and productive citizen.

Going over the guidelines calculation, the base offense level is 18, two levels are added for threat of bodily injury, four levels for use of a dangerous weapon, four levels for serious bodily injury to the victim, and I reduce that by [53] three levels for acceptance of responsibility, for a total offense level of 25, criminal history

category is one, and the range, therefore, is 57 to 71 months.

This defendant has requested departures for breaking the log jam. I deny that. There is also a request for departure for aberrant conduct, which I also deny. But again in light of the defendant's youth and what appears genuine acceptance of responsibility, I will sentence him at the low end of the guidelines to five years in custody, no restitution, no fine, because he cannot afford that. The mandatory $100 special assessment and three years of supervised release with the special condition that he get substance abuse counseling, and that he maintain steady employment.

The defendant is advised of the statutory right to appeal, but reminded that the plea agreement contained a waiver of certain appeal rights and again I direct that he discuss that matter with his attorney to determine whether there are any remaining appeal rights.

With respect to defendantgs Jeong and Lee are there open counts hat need to be dismissed?

MS. CHEN: The government moves to dismiss them at this time.

THE COURT:

THE COURT: The application is granted. I believe [54] that concludes our proceeding. Thank you, Counsel.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
(Filed Jan. 22, 2001)

JUDGMENT IN A CRIMINAL CASE
(FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1997)

UNITED STATES OF AMERICA
-vs-
IN SUK CHANG

CASE NO.: CR-00-58-1
COUNSEL: FRANK GEOLY

THE DEFENDANT;

X pleaded guilty to count(s) ONE and TWO OF INDICTMENT

_ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title / Section	Nature of Offense	Date Concluded	Count #
18:1951	Extortion Conspiracy	January 2000	ONE & TWO
18:1951	Extortion		

The deft is sentenced as provided in pgs. 2 through 4 of this judgment. The sentence is imposed pursuant to the Sectioning Reform Act of 1984.

_ The deft has been found not guilty on cts. _____ and is discharged as to such cts.

_ Count(s) _____ is/are dismissed by The Court.

X It is ordered that the deft shall pay a special assessment of $200.00 for count(s) ONE & TWO.

IT IS FURTHER ORDERED that the deft shall notify the U.S. attorney for this district within 30 days of any

change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defts S.S. No. 569-55-7697

Defts D.O.B. 5/21/65

Defts USM No: 54618-053

Defts residence address:

2047 Clintonville Street
Whitestone, New York 11357

January 10, 2001
Date of Imposition of sentence

/s/ [Illegible]
Signature of Judicial Officer

NINA GERSHON, U.S.D.J.
Name/Title of Judicial Officer

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:

ONE HUNDRED AND TWENTY ONE (121) MONTHS

_ The Court makes the following recommendations to the Bureau of Prisons:

_ The defendant is remanded to the custody of the U.S. Marshal.

_ The defendant shall surrender to the U.S. Marshal for this district.

_ at _____ on _____ at this district unless a designation has been made in which case the defendant should report to the designated facility.

_ as notified by the U.S. Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

_ by _____.

_ as notified by the U.S. Marshal.

_ as notified by the Probation Office.

RETURN

I have executed this judgment as follows: _____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

_____
By Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS

SPECIAL CONDITION: The defendant is to pay $200 restitution per month 60 days after release from custody.

The defendant shall report to the probation office in the district to which the defendant is released within 72

hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994;

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

_ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

X The defendant shall not possess a firearm as defined in 18 U.S.C. Section 921.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of Payments set forth above.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall comply with the additional conditions set forth above.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substance are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

_ The Court adopts the factual findings and guideline application in the presentence report.

X The Court adopts the factual findings and guideline application in the presentence report except: As stated on the record.

Guideline Range Determined by the Court

Total Offense Level: 30

Criminal History Category: I

Imprisonment Range: 97-121 MOS.

Supervised Release Range: 2-3 YRS

Fine Range: $15,000 to 150,000

X Fine is waived or is below the guideline range, because of the priority of restitution.

Total Amount of Restitution: $4,000.00 payable to the clerk of the court for the victim, Mr. Sung.

_ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. Section 3663(d).

_ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

_ Partial restitution is ordered for the following reason(s):

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range:

_ Upon motion of the government, as a result of defendant's substantial assistance.

_ For the following specific reason(s):

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	CR 00-58
-against-	United States Court House
IN SUK CHANG, KI HYUK KIM, MIN KYO LEE, DAE YOUNG JEONG,	Brooklyn, New York
Defendants.	October 10, 2000 2:00 o'clock PM

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE NINA GERSHON
UNITED STATES DISTRICT JUDGE

* * *

[68] Q At some point after the incident, Mr. Sung, did you write a letter to Judge Gershon, the presiding judge here today, in connection with this case?

A Yes, I did.

Q I'm going to show you what's been marked as Government Exhibit [5].

* * *

[71] Q Now, what exactly did you mean when you said that Chang never coerced you?

A I never thought that I was being threatened by Mr. Chang. Not even once.

Q Now, are you saying that before the incident, you never felt like Mr. Chang was threatening you?

A Right.

* * *

[72] Q Did you think it was possible that if you continued to work there and did not use Dae Myung's car service that you could be beaten again?

A I doubt it.

* * *

APPENDIX D
GOVERNMENT EXHIBIT 5

Dear Honorable Justice!

My name is Ki Young Sung. I am a victim from the incident [involving] Northern Northern Restaurant and Dae Myung Call Taxi. I am [writing] now to let you know of the truth. By doing this I humbly hope [my statement] will be taken into your consideration in making a wise (informed) and fair judgment.

If I may begin with my conclusions as follows.

Mr. In Suk Jang of Dae Myung Call Taxi and his tem never coerced me to call for (their) car service, imposed purchase of alcoholic beverages, or made various threats to me.

I have stated clearly at the F.B.I. office that they never threatened me. The coupons provided by Dae Myung Call Taxi were merely for service purposes of offering their customers *20% D/C* (discount) per each coupon. That offer never forced (anyone) to call for their car service.

In my first statement made on the day of the incident, because I was angry about having gotten beaten, I said that I had been coerced to call for their car service; I was also following an instruction by Dae Hyun Park, president of Northern Northern Restaurant. I told the *F.B.I.* attorney about this too.

I heard that they (Dae Myung Call Taxi) pushed sales of alcoholic beverages, which was no true as far as Northern Norther Restaurant was concerned. I know about this better than anyone else having worked there (at Northern

Northern) since before they *opened* it. If you need further details involving alcohol beverages, I will tell you everything at your request at any time.

Your Honor!

I do not like them because they beat me, but I would like to clarify what they did not do. I hope they will not get severe punishment unfairly. If these young people with much work lying ahead of them end up wasting their life because of this, I would feel sinful about it even though I was beaten; I have deeply pondered about that.

If you need further details, please call me. Having lived in the U.S. only for two years, I am not familiar with the laws here. I anticipate that the F.B.I. might scold me for doing this. Regardless, I cannot change my view that the truth must be revealed. Thank you for reading this through.

September 16, 2000

Ki young Sung
(signed)

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	CR 00-58
	United States Court House
-against-	Brooklyn, New York
IN SUK CHANG, KI HYUK KIM, MIN KYO LEE, DAE YOUNG JEONG,	January 10, 2001 11:00 o'clock AM
Defendants.	

TRANSCRIPT OF SENTENCE
BEFORE THE HONORABLE NINA GERSHON
UNITED STATES DISTRICT JUDGE

* * *

[15] THE COURT: Thank you.

Mr. Chang, is there anything that you would like to say to me? Perhaps you should come up so the reporter can hear you.

MS. CHEN: Does he require the interpreter, your Honor?

THE DEFENDANT: I would like to have the translator.

I plead guilty for the charges of the extortion on May 31st. The reason why I admitted the extortion was is due [16] to attorney's definition of the term. I do not intend to deny the extortion at this point, but I have one question to ask the judge. Why – how it established the extortion

when the witness, the victim acknowledged that – the fact that there was no damage –

(Defendant speaking).

That's not what I said. The victim said there was clearly not a threat and I would like to find out if this is a true extortion case. I'm not denying what I have done but I would like to know if this is the extortion case. The lawyer told me I committed – affected commerce. I would like to know how I affected commerce.

THE DEFENDANT: Since I am charged by interstate commerce, I would like to find out how I affect the commerce.

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	PRESENTENCE INVESTIGATION REPORT
-vs-	DOCKET NO. OO-CR-58-01
IN SUK CHANG, KI HYUK KIM, MIN KYO LEE, DAE YOUNG JEONG, Defendants.	

Sentence date: September 21, 2000, at 3:00 PM

* * *

Date Report Prepared: August 22, 2000

Multiple Count Adjustment

* * *

63. Adjustment for Acceptance of Responsibility: The defendant pleaded guilty and notified the Government of his intention to do so in a timely manner. Per Guideline 3E1.1(a) and 3E1.1(b)(2), 3 levels are subtracted.